IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 12, 2005 Session

ROBERT HENRY THYM v. MARY DAVENPORT THYM

Appeal from the Circuit Court for Davidson County
No. 93D-1041 Carol Soloman, Judge

No. M2004-02389-COA-R3-CV - Filed January 9, 2006

In this post-divorce alimony modification case, the primary issue is whether the trial court erred in applying T.C.A. § 36-5-101(a)(3) (now T.C.A. § 36-5-121(f)(2)(B)), the "cohabitation statute," to terminate Robert Henry Thym's alimony payments. Based on its finding that Mr. Thym was living with another person, the trial court terminated the $4,000 per month payments owed under the divorce decree by Mary Davenport, Mr. Thym's former wife. We hold that the alimony payments should be suspended rather than terminated, pursuant to the terms of the statute. We affirm the judgment of the trial court in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified; Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL PICKENS FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

William B. Bradley, Brentwood, Tennessee, for the Appellant, Robert Henry Thym.

John J. Hollins, Sr. and James L. Weatherly, Jr., Nashville, Tennessee, for the Appellee, Mary Davenport.

OPINION

I. Factual and Procedural Background

The parties were divorced by final decree entered August 8, 1994. The decree referenced and incorporated the parties' marital dissolution agreement ("MDA"), which provided that "[f]or the support and maintenance of Husband, and as a further division of the marital estate, Wife agrees to pay Husband the sum of. . .$4,000.00 per month. . .for a period of twenty (20) years or until Husband's death or remarriage, whichever is the first event to occur." On July 8, 2003, Ms. Davenport filed a motion to suspend her alimony obligation.

In the motion, Ms. Davenport alleged that there had been a substantial and material change in circumstances since the entry of the divorce decree, in that Mr. Thym "is living at the residence of another third person, namely Sally Branham[.]" Mr. Thym answered, denying this allegation and arguing, among other things, that "[t]he award of alimony was also a further division of the marital estate, therefore, said award is non-modifiable[.]"

On June 4, 2004, Mr. Thym filed a motion to dismiss, alleging that the alimony provision in the MDA "is not an award of alimony *in futuro* which is subject to the provisions of T.C.A. § 36-5-101(a)(3)" (presently codified at §36-5-121(f)(2)(B)). Mr. Thym further argued that because "there was no prayer or demand for alimony in any of the pleadings or proof before the Court and the divorce was granted based upon the Marital Dissolution Agreement, the alimony provision retains its contractual nature, T.C.A. § 36-5-101(a)(3) is not applicable and the Court has no authority to modify the provision." The trial court denied the motion to dismiss.

On July 6, 2004, the trial court held a hearing on Ms. Davenport's motion to suspend alimony payments. Based upon its findings that Mr. Thym was living with Ms. Branham, that she was providing him support in the form of food, shelter, utilities and other domestic necessities, and that Mr. Thym had not rebutted the statutory presumption that he no longer needed alimony, the court terminated the alimony payments.

II. Issues Presented

Mr. Thym appeals, raising the following issues, which we restate:

(1) Whether the trial court erred in holding that the MDA was incorporated by and merged into the final decree of divorce.

(2) Whether the trial court erred in ruling that the $4,000 monthly payments were alimony *in futuro* rather than a division of marital property.

(3) Whether the trial court erred in applying T.C.A. § 36-5-101(a)(3) (now T.C.A. § 36-5-121(f)(2)(B)) to terminate the monthly payments from Ms. Davenport.

(4) Whether the trial court erred in not allowing Mr. Thym to make an offer of proof regarding the size and division of the marital estate in 1994.

(5) Whether the trial court erred in excluding, as hearsay, his testimony about a statement made to him by his divorce attorney.

III. Standard of Review

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations that we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are accorded no such presumption. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

Our Supreme Court has further elaborated upon our standard of review in a spousal support modification case by noting that "[b]ecause modification of a spousal support award is factually driven and calls for a careful balancing of numerous factors, . . .a trial court's decision to modify support payments is given wide latitude within its range of discretion." *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001)(internal quotation marks and citations omitted). Consequently, appellate courts "are generally disinclined to second-guess a trial judge's spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes." *Id.*

IV. Analysis

Mr. Thym argues that the court erred in holding that the parties' MDA was incorporated and merged into the decree of divorce. He asserts that because the MDA was not so incorporated, the trial court was without authority to modify the terms of the MDA, including the provision for monthly payments from Ms. Davenport. Mr. Thym relies upon the following provision of the divorce decree:

> It is further ORDERED and ADJUDGED by the Court, and the Court affirmatively finds, that the Marital Dissolution Agreement heretofore signed by the parties and submitted to the Court does make equitable and sufficient provision for the division of the marital properties, and the Court approves the Agreement *which is filed herewith and placed under seal by agreement of the parties.*

The italicized part of the above language was handwritten, initialed by counsel for the parties, and replaced the typewritten language stating "and incorporates the same herein verbatim as follows[,]" which language was elided.

Ms. Davenport asserts that the trial court was correct in finding that the decree incorporated the MDA, relying, as did the trial court, on this provision in the decree: "[w]ith permission of the Court, the Final Decree of Divorce *incorporating this Agreement* shall be placed under seal." [Emphasis added].

It is clear that the two provisions of the decree quoted above cause some ambiguity regarding this issue, but we are of the opinion that the trial court did not err in finding that the MDA was incorporated by the trial court's language "incorporating this Agreement" and that the trial court had the authority to modify the alimony provision. We concur with the trial court's implicit finding that this was "clear language by the court incorporating these provisions by reference." *Brewer v. Brewer*, 869 S.W.2d 928, 932 (Tenn. Ct. App. 1993).

Mr. Thym next argues that the trial court should have construed the $4,000 monthly payments to be part of the division of marital property and not alimony *in futuro*. Ms. Davenport

argues that the clear language of the MDA compels the conclusion that the trial court correctly construed the payments as alimony *in futuro*. The MDA provides as follows in pertinent part:

> (8) **PERIODIC ALIMONY:** For the support and maintenance of Husband, and as a further division of the marital estate, Wife agrees to pay Husband the sum of FOUR THOUSAND DOLLARS ($4,000.00) per month ($48,000.00 PER YEAR) for a period of twenty (20) years or until Husband's death or remarriage, whichever is the first event to occur. The first payment shall be due on August 1, 1994, and a like sum on the first day of each month thereafter until this obligation is satisfied in full. This sum shall be tax deductible to Wife and taxable to Husband for purposes of filing their respective Form 1040 Federal Income Tax returns.

Obviously, this paragraph (8) bears the heading "Periodic Alimony," which is another name for alimony *in futuro*. T.C.A. § 36-5-121(f)(1)(alimony *in futuro* "also known as periodic alimony"). This stands in contrast to the heading of the previous paragraph of the MDA: "(7) **DIVISION OF MARITAL ESTATE**." We further note that the full paragraph (8) of the agreement refers to the monthly payments of $4,000 as "alimony" in four separate places.

In *Waddey v. Waddey*, 6 S.W.3d 230 (Tenn. 1999), the Supreme Court discussed the characteristics of an award of alimony *in futuro*, as distinguished from alimony *in solido*, as follows:

> Whether alimony is *in futuro* or *in solido* is determined by either the definiteness or indefiniteness of the sum of alimony ordered to be paid at the time of the award. *McKee v. McKee*, 655 S.W.2d 164, 165 (Tenn.App.1983). Alimony *in solido* is an award of a definite sum of alimony. *Spalding v. Spalding*, 597 S.W.2d 739, 741 (Tenn.App.1980). Alimony *in solido* may be paid in installments provided the payments are ordered over a definite period of time and the sum of the alimony to be paid is ascertainable when awarded. *Id.* Alimony *in futuro*, however, lacks sum-certainty due to contingencies affecting the total amount of alimony to be paid. *McKee*, 655 S.W.2d at 165-66 (holding alimony was *in futuro* where husband was ordered to pay the mortgage note until either the son turned twenty-two or the house was sold). It is therefore clear that the duration of an award of alimony *in futuro* may be affected by contingencies agreed upon by the parties or imposed by courts.
>
> The continued payment of alimony in the case now before us was subject to three contingencies: remarriage, death, or the passage of March 1, 1996. These contingencies affected the duration of the alimony. Accordingly, the sum of the alimony payable to Mrs.

> Waddey was not determinable when the alimony was awarded. The mere happening of a contingency does not convert an award of alimony *in futuro* to an award of alimony *in solido.* The award of alimony *in solido* must be ascertainable when ordered, not years later when a contingency terminates the award.

Waddey v. Waddey, 6 S.W.3d 230, 232 (Tenn. 1999).

In the present case, as in *Waddey*, the alimony lacks sum-certainty due to contingencies potentially affecting the amount and duration of alimony to be paid. The agreement in this case contains essentially the same three contingencies as were present in *Waddey*: death or remarriage of the recipient, or the passage of twenty years from the time of the first payment. Thus, both the language of the MDA itself and the *Waddey* decision support the conclusion that the payments are alimony *in futuro*.

Further, there was no testimony at the hearing that the payments were intended to be part of the property division rather than spousal support payments. Mr. Thym testified simply that "I thought I was going to receive $960,000 for the term of 20 years." Ms. Davenport testified that she wanted to stop paying alimony "because [Mr. Thym] is living like a married man without a piece of paper from the Courts and to me that is what I was told alimony would mean at the time I got my divorce because I asked about a live-in situation." Mr. Thym further testified as follows:

> Q: Now, also in 2001 – and I can't find the notice right now – but you advertised the condo [Mr. Thym's residence] for sale. Do you remember that?
> A: Yes, sir.
> Q: Why did you decide to sell it at that time?
> A: Because I was planning to move in with Sally Branham.
> Q: Well, you were already living with her, except two days, one day a week, something like that?
> A: Money.
> Q: Why did you take it off the market?
> A: On advice of counsel.
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> * * *
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> Q: You testified that you planned to move in with Sally Branham when you had your condo up for sale in March of 2001? Did you testify to that?
> A: Yes, I did.
> Q: Tell the Court why you didn't move in.
> A: Well, I got it on advice of counsel.
> Q: You didn't move in because you knew for sure you'd lose your alimony. Isn't that true?
> A: I don't know for sure.

> Q: Give us another reason.
> A: At the time I didn't.
> Q: Give us another reason. You knew that if you sold your condo and you moved in with her, your alimony would be gone, didn't you?
> A: That's right. Correct.
> Q: That's the reason you did it.
> THE COURT: He said correct.
> MR. THYM: That was part of it.
> Q: What's the other reason?
> A: That I like to have time to myself. I said that.

Mr. Thym argues in his brief that the trial court erred in denying him the right to make an offer of proof "regarding the net worth of the parties at the time of the divorce. . .in order to support [his] position that the $4,000 monthly payments were agreed upon based not upon need but as a division of property."

The general rule is that "an offer of proof should be allowed, and refusing to allow an offer of proof generally is considered error." *State v. Torres,* 82 S.W.3d 236, 251 (Tenn. 2002); *Alley v. State,* 882 S.W.2d 810, 816 (Tenn. Crim. App. 1994). Whether a trial court's refusal to allow an offer of proof depends on the facts and circumstances of each individual case, "including the apparent nature and admissibility of the evidence and its relation to determinative issues." *Alley,* 882 S.W.2d at 816. "An offer of proof serves two primary purposes: (1) informing the trial court about the proof the party is seeking to offer; and (2) creating a record so that an appellate court can review the trial court's decision." *Torres,* 82 S.W.2d at 251.

In the present case, we have concluded that the trial court's refusal to allow the offer of proof relating to the relative net worth of the parties at the time of divorce is not reversible error, because the record on appeal contains enough of the excluded evidence for us to make a determination and ruling. *See Alley,* 882 S.W.2d at 816-17 and fn. 10. Mr. Thym filed a post-judgment motion "to Amend Findings and Judgment." Filed with the motion, and included in the record before us, was Mr. Thym's affidavit containing his assertions and allegations of fact regarding his argument that the alimony award was actually part of the division of property, and also some 90 pages of supporting documentation. Thus, we have been able to intelligibly review the proffered evidence, and find no reversible error in the trial court's refusal of the offer of proof under the circumstances presented in this case.

Mr. Thym argues that the trial court erred in not allowing him to testify what his attorney said to him during the divorce litigation. His affidavit states as follows in relevant part:

> . . .I brought up the issue of inflation and asked both of these attorneys whether or not I could come back to court if we had another period of major inflation and ask the court to adjust the monthly payments to account for the inflation. It was at this time that

> [attorney] Bobby Jackson directed me not to count on ever being able to change or increase the $4,000 amount if I accepted this offer. I understood his statement to not be just advice but a direction to me not to agree to this settlement offer if I thought I might want to ever try to get more.

Upon objection, the trial court disallowed this evidence as hearsay, and the following discussion ensued:

> [Mr. Thym's counsel]: Your Honor, in response to Mr. Hollins's objection, permit me to say that where there is an order given or directive given, that it's an exception to the hearsay rule.
> [Ms. Davenport's counsel]: There's no such exception.
> THE COURT: Well, I don't think that Mr. Jackson could enter an Order. I think I'm the only one or the prior Judge could enter an Order. Now, he might demand something of his client such as a fee but he can't issue an Order. I'm afraid you're trying to change this man's wording to get by the hearsay rule and the rule is talking about an Order or directive of the Court. . .

We note at the outset that the Tennessee Rules of Evidence do not contain an exception to the hearsay rule for a "directive" or "order" given by the declarant. Tenn. R. Evid. 803. In his brief, Mr. Thym cites *Tennessee Law of Evidence* (4th ed.) § 8.01[10] at p. 8-22 (Cohen, Sheppeard & Paine 2000), stating that "[o]rders or instructions are often not hearsay because they are not offered to prove the truth of their content[.]"

Mr. Thym did not argue to the trial court that the statement was not offered to prove the truth of the matter asserted. We are of the opinion that even assuming, for purposes of argument, that it was error to disallow the statement as hearsay, such error would be *de minimus* and certainly not grounds for reversal, considering the entire context of the hearing and appellate record.

The trial court applied T.C.A.§ 36-5-101(a)(3), now codified at T.C.A. § 36-5-121(f)(2)(B), the "cohabitation statute," to terminate Mr. Thym's alimony. The statute provides as follows:

> (B) In all cases where a person is receiving alimony in futuro and the alimony recipient lives with a third person, a rebuttable presumption is thereby raised that:
>
> (i) The third person is contributing to the support of the alimony recipient and the alimony recipient does not need the amount of support previously awarded, and the court should suspend all or part of the alimony obligation of the former spouse; or

> (ii) The third person is receiving support from the alimony recipient and the alimony recipient does not need the amount of alimony previously awarded and the court should suspend all or part of the alimony obligation of the former spouse.

Mr. Thym argues that the trial court should not have applied this statute to terminate his alimony. He asserted at the hearing that he did not "live with" Ms. Branham because he owned and maintained a separate residence at his condominium.

Mr. Thym began dating Ms. Branham in 1995. He testified that he did not move in with her until 2000 when he underwent knee surgery. Mr. Thym stated that "probably [at the] end of the year of 2000" he moved some of his clothing and belongings to her house. He admitted that statements he made in his deposition were correct that he spent every night except "probably one night a week" at Ms. Branham's residence, during the months of March, April, June, August and September of 2003.

Janice Holt, a private investigator hired by Ms. Davenport, testified that she conducted drive-by surveillances of the residences of Mr. Thym and Ms. Branham. Of the thirty-seven times Ms. Holt reported seeing Mr. Thym's automobile at one of the residences, only seven of them were at his condo. Six of these seven occurrences were on a Monday.

Based upon our review of the entire record, including the above testimony, we find the evidence does not preponderate against the trial court's ruling that Mr. Thym was "living with" a third person for the purposes of the cohabitation statute. *See Azbill v. Azbill*, 661 S.W.2d 682 (Tenn. Ct. App. 1983). We also concur with the trial court's holding that Mr. Thym did not rebut the statutory presumption that he did not need the amount of alimony previously awarded.

Mr. Thym testified that he did not pay Sally Branham for food or any other domestic expenses. He stated that he ate an average of ten meals per week at Ms. Branham's house, and that he had not been to a grocery store since 1994. Mr. Thym further testified that he once loaned Ms. Branham $92,000 for a nine-day period so that she could close on a new house. We hold that the evidence does not preponderate against the ruling that Mr. Thym did not rebut the presumption that he did not need the $4,000 per month alimony payments.

However, this court has recently stated that "if the [statutory] presumptions of support and lack of need arise and are unrebutted, the court's remedy is to "*suspend* all or part of the alimony obligation," not terminate the alimony." *Evans v. Evans,* No. M2002-02947-COA-R3-CV, 2004 WL 1882586 at *5, 2004 Tenn. App. LEXIS 547 at *15 (Tenn. Ct. App. M.S. filed Aug. 23, 2004)(emphasis in original). Pursuant to the clear statutory language of T.C.A.§ 36-5-101(a)(3), now codified at T.C.A. § 36-5-121(f)(2)(B), we modify the judgment of the trial court to suspend, rather than terminate, the monthly alimony payments due to Mr. Thym.

V. Conclusion

For the aforementioned reasons, the judgment of the trial court is modified to provide that the $4,000 monthly payments of alimony *in futuro* shall be suspended rather than terminated. The trial court's judgment is in all other respects affirmed. Costs on appeal are assessed to the Appellant, Robert Henry Thym.

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SHARON G. LEE, JUDGE